

## DISTRICT OF NEVADA

\* \* \*

UNITED STATES OF AMERICA

Case No.: 2:15-cr-00057-RFB

Plaintiff,

## ORDER

V.

CARLOS INCLAN, JR.

Defendant.

## I. INTRODUCTION

Before the Court is the government's Motion for Reconsideration [Dkt. 88, 94] of this Court's order regarding exclusion of evidence. Before the Court, additionally, is Defendant's Motion in Limine to Exclude Exhibits [Dkt. 90]. The Court had previously orally ruled on these motions and indicated that a further written ruling would follow. For the reasons stated below, the Motion in Limine [Dkt. 90] is GRANTED and the Motion for Reconsideration [Dkt. 88, 94] is DENIED.

## II. BACKGROUND

The Court makes the following findings of fact and holdings.

### A. Procedural Background

On February 25, 2015, Mr. Inclan was charged in an indictment with Receipt of Child Pornography under 18 U.S.C. 2252A(a)(2), Possession of Child Pornography under 18 U.S.C. 2252A(a)(5)(B), and Advertising Child Pornography under 18 U.S.C. 2251(d).

1 The indictment does not list the number of images of child pornography the government intends to  
2 use to prove its case, nor does it provide a description of the images related to any of the counts. After  
3 executing a search warrant at Mr. Inclan's residence on April 12, 2012, the Las Vegas Metropolitan Police  
4 Department ("LVMPD") seized eleven computers and 27 hard drives. The LVMPD also seized 184 CDs  
5 and DVDs. The LVMPD completed a forensic review of some of the seized devices, and reported that it  
6 had found child pornography on three computers, three hard drives, and thirteen discs. The government  
7 alleges these devices contain thousands of images and videos of child pornography.

### 8 **1. Pretrial Exhibit Disclosure Order**

9 In light of the number of images and videos located on numerous devices, Mr. Inclan filed a Motion  
10 for Bill of Particulars, arguing he could not adequately prepare a trial defense without knowing which  
11 images and videos from which devices the government intended to introduce. [Dkt. 26].

12 On February 23, 2017, the Court held a hearing regarding pre-trial case management, and addressed  
13 the Motion for Bill of Particulars. [Dkt 66, Transcript of Hearing]. At this hearing, the Court discussed with  
14 the government the nature of the case and the images involved. The Court found based upon the record that  
15 the Defendant would need to know which digital files the government intended to use at trial to be able to  
16 adequately prepare possible defenses. The government indicated that it did not intend to use all of the  
17 thousands of images but instead would only be using a select number of digital files. The Court denied the  
18 Motion for Bill of Particulars, because it was requested outside of the time limits prescribed by Fed. R.  
19 Crim. P. 7(f), but the Court nevertheless entered a Pretrial Case Management Order ("February 23 Order"),  
20 requiring disclosure of the exhibits the government intended to introduce at trial. [Dkt 66, p 5].

21 As is evident from the record, the Court entered its February 23 Order pursuant to its authority  
22 under Fed. R. Cr. P. 2 and 16, and its more general inherent authority to manage its docket. See U.S. v.  
23 W.R. Grace, 526 F.3d 499, 509 (9th Cir. 2008) (explaining that a Court may require a finalized list of  
24 witnesses and trial exhibits in advance of trial pursuant to its authority under Fed. R. Cr. P. 2 and 16, and  
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1 its managerial authority). The Court issued the Order in the interest of effective case management. The  
2 Court found that it would have been highly inefficient and unfair to require Inclan to have to prepare for  
3 the possibility of defending against the unique forensic characteristics of each of the thousands of images  
4 or files. Relatedly, the Court also issued the Order based upon its finding that there are thousands of digital  
5 images and that the Defendant would need to know which digital files the government might offer into  
6 evidence as the defenses could vary based upon each individual digital file. Given the Court's findings,  
7 the government's identification of the range of potential digital files to be used was necessary "to inform  
8 the defendant of the nature of the charges against him with sufficient precision to enable him to prepare for  
9 trial, to avoid or minimize the danger of surprise at the time of trial, and to enable him to plead his acquittal  
10 or conviction in bar of another prosecution for the same offense when the indictment is too vague and  
11 indefinite for such purposes." United States v. Ayers, 924 F.2d 1468, 1438 (9th Cir. 1991) (internal  
12 quotations omitted).

13 The Court ordered the government to identify a set of 50 digital images from which it would offer  
14 evidence at trial. The Court accommodated the schedule of counsel for the government, and set a deadline  
15 for April 7, 2017 for the required disclosure to Inclan. [Dkt 66, pp 6-7]. The Court also informed the  
16 government that it was permitted to provide up to 50 images or files on the exhibit list, and would  
17 subsequently be permitted to seek leave of Court to substitute any of the images or files on that list with  
18 *forensically similar* images before the commencement of trial. [Dkt 66, pp 9, 11]. The government did not  
19 file any objections to the Court's *authority* to issue the February 23 Order.

20 On April 6, 2017, the government produced to the defense an April 3, 2017 Examiner Report,  
21 authored by Detective Ramirez, a government witness. The government represented to the defense that the  
22 list contained within the Examiner Report was the list of images it intended to use at trial. The report listed  
23 53 images and videos.  
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## 2. Court's Enforcement of its Pretrial Order

Mr. Inclan filed a Motion in Limine on April 28, 2017, arguing, in part, that the government's list violated the Court's order in that it exceeded the limit of 50 images and/or videos. [Dkt. 80]. Importantly, in this motion, Inclan revealed a defense to Counts One and Three of the Indictment. Inclan argued that the Court, pursuant to Federal Rule of Evidence 403, should reduce or restrict even further the number of files or images, because the original list of 17 images and 36 videos could only serve as a basis for Count Two. Inclan revealed that the access dates and other access information associated with the images from the original list demonstrated that all of these images could only be relevant to a possible charge for possession of child pornography (Count Two) and not receipt (Count One) or advertising (Count Three). This argument about excessive evidence under Rule 403 by Inclan thus clearly revealed a potentially potent and dispositive defense to the government.

In response to the motion, the government then emailed defense counsel a new list of 50 images and videos on May 1, 2017, which included four files which were not contained in the government's initial list. The government also filed, on this same date, a response [Dkt. 82] to the motion and sought leave of the Court to add four additional images or files to its original list. The government acknowledged in its response that the four images were not previously provided and, more significantly, that the new images address the potential defense regarding Inclan's receipt and advertising offense conduct. The government noted, without explanation, that these four images had been omitted from the original list "in error."

The Court finds, factually and legally, that the government has violated the Court's February 23 Order in two ways. First, it did not comply with the Court's directive to submit to the defense a final list of 50 images and videos by April 7, 2017. Second, and more importantly, it supplemented its list with at least four images that were forensically dissimilar from the files or images on the original list. The government does not deny these violations. It only asserts an honest and good faith mistake for its actions.

1           The Court did not find (and does not find) that the government had good cause to violate the Court's  
2 February 23 Order. The Court finds that the government, as of the date of the February 23 Order, had  
3 possession of the drives and digital storages devices that contained the alleged contraband images that were  
4 the basis for the charges in this case. The Court finds that the government and its experts prior to April 7,  
5 2017 had analyzed and reviewed the contents of the drives and digital storage devices that had been seized  
6 in this case. The government was made aware and understood on February 23, 2017 that the Court found  
7 as a matter of law that the defenses to the charges in the indictment could vary based upon the forensic  
8 characteristics of each digital file. The government understood as of February 23, 2017 that the Court was  
9 directing the government to provide a list of possible digital files to be presented at trial precisely because  
10 the Court had found that the Defendant would need to be able to prepare defenses unique to the digital files  
11 identified by the government pursuant to the Court's Order. The Court finds that the government  
12 understood, since the inception of the filing of the charges in this case, or at least as of February 23, 2017,  
13 that the forensic characteristics of the files would be a crucial aspect to proving the various charges filed  
14 against Inclan. Given the fact that there were multiple individuals who could have been associated with or  
15 used the media upon which the contraband files were found, the Court finds that the government  
16 understood, *before* submitting its original list, the significance for the charges of selecting files from media  
17 with respect to each of the different charges in the indictment. There were no extenuating circumstances  
18 for the government's failure to identify digital images necessary to its case by April 7, 2017. Thus, the  
19 Court finds that the government has not presented a reasonable basis for its error and lack of diligence in  
20 the original disclosure.

21           Mr. Inclan filed a Motion in Limine on May 3, 2017, to exclude all of the government's exhibits as  
22 a result of its violation of the Court's order, or, alternatively, to exclude the four images which were added  
23 subsequent to the April 7, 2017 deadline. [Dkt. 84]. At Mr. Inclan's May 9, 2017 calendar call, the Court  
24 denied in part and granted in part Mr. Inclan's Motion in Limine. It excluded the four forensically dissimilar  
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1 images which were added after April 7, 2017. The Court did not find a basis for modifying its February  
2 23 Order to permit a late disclosure of new digital images. The Court thus enforced its February 23 Order  
3 and denied the government's request to be able to use the four new digital files or images.

4 After this calendar call, the government filed a Motion to Reconsider, as well as a Supplement to  
5 its Motion to Reconsider. [Dkt. 88, 94]. The government sought a reconsideration of the Court's order on  
6 the four images which were submitted after the April 7 deadline. In the alternative, the government  
7 submitted new digital files containing photographs and email fragments which it sought to substitute as  
8 exhibits. The government acknowledged that these new files had not been previously identified as required  
9 by the February 23 Order and the government acknowledged that this second set of substitute files were  
10 not forensically similar to files on the original list provided to the Defendant on April 6, 2017. The Court  
11 held a hearing prior to the commencement of trial on May 15, 2017, and denied the Motion to Reconsider.  
12 The government offered (and continues offer) no reason or extraordinary circumstances for its violations  
13 other than a simple mistake. The Court again enforced its February 23 Order, denying the government's  
14 request, and the Court made additional findings on the record. The Court indicated that it would also issue  
15 a written order elaborating its reasons for denying the government's motions. This order follows. The  
16 Court incorporates by reference its discussion and findings from the hearing into this written order.

### 17 18 **III. LEGAL STANDARD**

19 The Federal Rules of Criminal Procedure make no specific provision for motions for  
20 reconsideration of an order enforcing a pretrial order, or of an order to exclude evidence. The government  
21 brings its Motion for Reconsideration on an equitable basis, and also cites to the principles of Fed. R. Civ.  
22 P. 60(b)(6). Under that rule, a court may relieve a party from a final judgment, order, or proceeding for any  
23 reason that justifies relief. Fed. R. Civ. P. 60(b)(6).

1           **IV. ANALYSIS**

2           The government essentially argues that the Court should reconsider its enforcement order on the  
3 basis that it would be unfair to the government to exclude the four images from being presented to the jury,  
4 since this requires a substantial revision of the government’s theory of its case. The government further  
5 argues that the Defendant has known about all of the seized images since the beginning of the case, and  
6 therefore is not unduly prejudiced by adding them now. It argues that the appropriate remedy would be to  
7 continue the case to allow Defendant to adequately prepare his defenses to the new images, rather than to  
8 exclude the images.

9           **A. Exclusion of the Four Images Disclosed After the April 7 Deadline**

10          The Court has several bases for enforcing its pretrial order, which are rooted in the purposes of the  
11 February 23 Order itself. Allowing the government to subsequently add forensically dissimilar images to  
12 its exhibit list, in direct violation of the Court’s pretrial order, would: a.) undermine the Court’s inherent  
13 authority to orderly administer justice and its docket; b.) allow the government, through its own lack of  
14 diligence, to violate Mr. Inclan’s due process rights; and c.) violate the Defendant’s right to a fair trial by  
15 having his defense prematurely disclosed to the government.

16                   **1. Inherent Authority and Authority Under the Rules**

17          There exists a “well established” principle that “[d]istrict courts have inherent power to control their  
18 dockets.” Atchison, Topeka & Santa Fe Ry. Co. v. Hercules Inc., 146 F.3d 1071, 1074 (9th Cir. 1998)  
19 (internal quotation marks omitted). “All federal courts are vested with inherent powers enabling them to  
20 manage their cases and courtrooms effectively and to ensure obedience to their orders.” Aloe Vera of Am.,  
21 Inc. v. United States, 376 F.3d 960, 964-65 (9th Cir. 2004). The Court’s February 23 Order requiring a  
22 disclosure of the evidence the government intends to use at trial, and its subsequent enforcement order,  
23 were both made pursuant to this inherent authority.

1           The government indicated that it had recovered thousands of images, and would not be using all of  
2 them at trial. Finding as a legal matter that the defenses in the case could depend upon the forensic  
3 characteristics of each digital file offered by the government, and recognizing the time-consuming and  
4 expensive expert forensic analysis related to each digital file, the Court determined that disclosure of a list  
5 of the digital files was necessary to advance the efficient administration of this case and the fairness of the  
6 proceeding. Fed. R. Cr. P. 16(a)(1)(E) requires that the government “permit the defendant to inspect and  
7 to copy or photograph...documents, data, photographs... if the item is within the government’s possession,  
8 custody, or control, and: (i) the item is material to preparing the defense; (ii) the government intends to use  
9 the item in its case-in-chief at trial; or (iii) the item was obtained from or belongs to the defendant.” Fed.  
10 R. Cr. P. 16(d) governs the Court’s powers to regulate discovery, and instructs that, “At any time the court  
11 may, for good cause, deny, restrict, or defer discovery or inspection, or grant other appropriate relief.” Fed.  
12 R. Cr. P. 16(d)(1). It also provides that the court may enforce “this rule,” including by any order “that is  
13 just under the circumstances.” Fed. R. Cr. P. 16(d)(2). The Rules “are to be interpreted to provide for the  
14 just determination of every criminal proceeding, to secure simplicity in procedure and fairness in  
15 administration, and to eliminate unjustifiable expense and delay.” Fed. R. Cr. P. 2. Viewed together, the  
16 Ninth Circuit has interpreted the rules to mean that the Court may require the pretrial production of a list  
17 of trial evidence “as a matter of its discretion.” W.R. Grace, 526 F.3d at 510-11. “Above all, nothing in  
18 Rule 16 expressly prohibits the district court from ordering additional pretrial discovery or disclosures that  
19 will further the objectives set forth in Rule 2... The Supreme Court has recognized that federal courts ‘may,  
20 within limits, formulate procedural rules not specifically required by the Constitution or the Congress’” Id.  
21 (quoting United States v. Hasting, 461 U.S. 499, 505 (1983)).

22           First, it must be noted that the government did not and has not challenged the Court’s authority to  
23 issue its February 23 Order. Rather, the government challenges the Court’s enforcement of this Order as  
24 an unnecessarily harsh remedy for its admitted violations of the Court’s Order.



1           The Court rejected and continues to reject the government’s argument. The Court entered its orders  
2 pursuant to its inherent authority to manage the case, and its authority under the Federal Rules. If the Court  
3 were to allow the government in this case or any other case to disregard the Court’s orders based on an  
4 asserted “honest mistake” and nothing more, it would effectively undermine the inherent authority of the  
5 Court under Rule 16 and implicitly shift that authority to federal prosecutors. While the government might  
6 argue the infrequency of its potential mistakes, the Court was not presented with evidence of infrequency  
7 and it was not the basis for the government’s motions. The Court finds that the government offered no  
8 evidence to establish that there was good cause for the mistake. Indeed, other than the government’s  
9 assertion that it was a mistake, the Court has no basis for independently verifying that it was a mistake.  
10 Given the fact that the Court might find it to be a potential separation of powers violation to require the  
11 government to provide evidence of its trial preparation process, this Court (and other courts) will frequently  
12 be in a situation of having to accept the government’s mere assertion of mistake. Allowing the government  
13 to violate a Court’s pretrial order on an unverifiable mere assertion of mistake would effectively place the  
14 administration and timetable of a case in the hands of federal prosecutors. This would violate the essence  
15 of Rule 16 and the Court’s authority.

16           Moreover, the Court finds the government’s position unavailing, because the government’s own  
17 lack of diligence caused its “mistake.” The Court finds that the government in this case would certainly  
18 understand (and did understand) the immense significance to its case of identifying the digital files or  
19 images that best support the respective charges in the indictment. Having brought the charges in the first  
20 place, the government was also fully aware of the different requirements or elements for proving the three  
21 different charges in the indictment. In a child pornography case involving multiple devices with multiple  
22 people having different access to the respective devices, the government understood that the defenses to  
23 the various charges in this case would have included the following potential arguments: that Inclan did not  
24 have access to, or use, the particular device upon which contraband was found; or that the forensic  
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1 characteristics of the file do not show that Inclan received or advertised a particular image or file. Thus,  
2 the Court does not find it appropriate to reconsider its enforcement of the order where the government was,  
3 at best, not diligent in the submission of its original list.

4 Additionally, the government's suggestion that the appropriate remedy for its admitted violation of  
5 the Court's order would be to include the belatedly disclosed evidence and to continue the trial likewise  
6 undermines the Court's inherent authority and the purpose of Rule 16. Under the Rule, the Court is charged  
7 with managing the efficient administration of the case and not the government. The position taken by the  
8 government in this case with regard to a continuance would again subordinate the Court's administrative  
9 authority and its orders to the interests and authority of federal prosecutors. The Ninth Circuit's reasoning  
10 and explanation of the application of Rule 16 in Grace supports this Court's holding in this case as to its  
11 own authority under Rule 16. W.R. Grace, 526 F.3d at 510-11.

## 12 **2. Defendant's Due Process**

13 The Court also based its pretrial order, as well as its enforcement order, on underlying principles of  
14 due process and fairness. In this case, the Court found as a legal matter that the nature of the Defendant's  
15 defenses could vary based upon the forensic characteristics of each digital file. Indeed, the very reason the  
16 government has so assiduously sought to submit new files is its recognition that its case regarding the  
17 various substantive charges (and hence the defenses to those charges) would be significantly impacted if  
18 the new files were to be used. This is precisely the reason the Court entered its February 23 Order. In fact,  
19 at the hearing the Court warned the government about its choice of images when it imposed the Order. The  
20 Court found that Inclan is entitled to understand, with specificity, the case that is being presented against  
21 him, and the Court issued its order in part to ensure his rights to a fair trial and due process of law, under  
22 the Fifth and Fourteenth Amendments. These fairness principles also underlie the Rules of Criminal  
23 Procedure. "It is recognized that wide latitude is reposed in the district court to carry out successfully its  
24 mandate to effectuate, as far as possible, the speedy and orderly administration of justice. A federal court  
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1 has the responsibility to supervise the administration of criminal justice in order to ensure fundamental  
2 fairness.” See United States v. Richter, 488 F.2d 170, 173-74 (9th Cir. 1973) (internal citations and  
3 quotation marks omitted). The Court determined that an April 7 disclosure would ensure fairness by giving  
4 Mr. Inclan sufficient time to prepare his defenses, and conduct forensic analysis of the evidence.  
5 Most importantly, the Court also finds that it would be fundamentally unfair and highly prejudicial to Inclan  
6 to allow the government to substitute these forensically dissimilar images after having now been informed  
7 of a possible defense by Inclan to the charges. Contrary to the government’s assertions, the Court finds it  
8 to be highly prejudicial to Inclan to allow the government to now offer different image or files. The Court  
9 set a disclosure schedule and it accompanied the schedule with a ruling that no further modifications to the  
10 government’s evidence list with forensically dissimilar images or files would be permitted. The  
11 government understood the purpose and implications of the Court’s order. The Defendant relied upon the  
12 Court’s order and revealed to the government through an *in limine* motion the nature of one of its defenses.  
13 This defense related to the specific images or files identified in the government’s original list. And based  
14 upon this revelation, the Court finds that the government sought to modify its original list with forensically  
15 dissimilar images to specifically address the defense revealed by Inclan in the *in limine* motion. The  
16 government did not seek to modify its digital file list until *after* Inclan revealed one of his defenses in the  
17 *in limine* motion. This is the very definition of unfair prejudice—the government learning of a defense  
18 that it would not have learned of but for its violation of the Court’s order, and then seeking to modify its  
19 evidence in defiance of the order to address the specific defense revealed by Inclan. The failure to enforce  
20 the Court’s order would be fundamentally unfair and highly prejudicial to Inclan and the Court declines to  
21 revise its ruling.

## 22 **B. Exclusion of the Additional Images and Email Fragments**

23 The government has presented additional alternative digital files as part of its Motion for  
24 Reconsideration, seeking to admit these in lieu of the four images which the Court has excluded. The Court  
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1 will not permit inclusion of this evidence, for all of the same reasons enumerated as to the initial four  
2 images which were not timely disclosed. None of these digital files were properly disclosed by April 7,  
3 2017, pursuant to the Court's February 23 Order. These digital files are offered at an even later date than  
4 the first four substitute files. Thus, the basis for rejecting them is even more compelling at this late stage.

5 Furthermore, the Court finds it appropriate to reject these new files as being irrelevant under Rule  
6 401 and unfairly prejudicial and confusing to the jury under Rule 403. The government could not  
7 adequately proffer that these images would establish Inclan's possession or use of the drives or storage  
8 devices upon which they were found. The Court does not find that the files themselves provide sufficient  
9 information to be relevant to the charges in this case. Additionally, the digital files containing images of  
10 children with Inclan, and the email file fragments, would be unfairly prejudicial without offering much  
11 probative value. The government seeks to present the images as evidence of Mr. Inclan's personal use of  
12 the devices on which the pornographic images were located. The Court agrees with Defendant, that the  
13 probative value of this evidence is outweighed by its prejudicial effect, and for that additional reason,  
14 excludes this evidence pursuant to Fed. R. Evid. 403.

15 The Court does note that its evidentiary rulings are always subject to reconsideration depending  
16 upon the revelation of new facts and how the case unfolds at trial.

17  
18 **V. CONCLUSION**

19 IT IS ORDERED that the United States' Motion for Reconsideration [Dkt 88] and its supplemental  
20 Motion for Reconsideration [Dkt 94] are DENIED.

21 IT IS FURTHER ORDERED that Defendant's Motion in Limine [Dkt 90] is GRANTED.

22 DATED this 4th day of August, 2017.

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RICHARD F. BOULWARE, II.  
United States District Court Judge